[APPELLATE CIVIL JURISDICTION]

AITKEN, J.

February 12, 1938.

LENG LAN (F) - Plaintiff-Appellant.

v.

S. M. YESUDIAN - Defendant-Respondent.

(PERAK MAGISTRATE'S CIVIL APPEAL No. 30 of 1937)

Civil Procedure Code (Cap. 7) Section 188—Scope of.

The Plaintiff-Appellant sued the Defendant-Respondent in the Magistrate's Court for money lent. After recording evidence from the Plaintiff and his witnesses and from the Defendant and his witnesses the Magistrate reserved his decision. A day or two after the Magistrate had reserved his judgment the Defendant told his counsel that there was a certain Chinese who could have given very material evidence on his behalf had he been called. Thereupon counsel drew up an affidavit for the defendant to affirm which concluded with a request for the Court to exercise its power under section 188 of the Civil Procedure Code to call the said Chinese to give evidence.

Held, that the scope of section 188 is very limited and only applies when the Court, from the evidence adduced by the parties, comes to the conclusion that there is a person mentioned in that evidence who could, were he called as a witness, give really material evidence on one or more of the issues of fact raised during the trial.

MAGISTRATE'S CIVIL APPEAL.

S. Seenivasagam for the Appellant.

J. L. Woods for Respondent.

Aitken, J.—After setting out the facts and dealing with the evidence His Lordship said:—

Section 188 of the Civil Procedure Code reads as follows:—

> "Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person, other than a party to the suit, who is not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document."

To my mind the scope of this section is very limited, and only applies when the Court, from the evidence adduced by the parties, comes to the conclusion that there is a person mentioned in that evidence who could, were he called as a witness, give really material evidence on one or more of the issues of fact raised during the trial. In such a case the presiding Judge or Magistrate, acting under and in accordance with this section, may call that witness at the trial and not after; and in doing so he must bear in mind that the witness he calls is liable to be cross-examined by any of the parties to the suit. Thus, if one of the parties to the suit objects to any person being called as a witness by the Court, the presiding Judge or Magistrate should not exercise his powers under this section 188 unless he is satisfied that his evidence is necessary to enable him to do justice between the parties: see the English case of *In re Enoch and Zaretzky, Bock & Co's. Arbitration* (1910) 1 K.B. 327. In this particular case it is almost a labour of supererogation to point out that Ng Pai's name was never mentioned in the evidence adduced before the learned Magistrate, and that the latter cannot possibly have considered his evidence as in any way necessary to enable him to arrive at a correct decision.

When a party to a law suit discovers, or bethinks himself of fresh evidence after the hearing is complete, he cannot properly do anything about it until judgment is delivered. Then, if judgment is in his favour, there is obviously no need for him to do anything about it. If judgment is against him, he may apply to the Court for a review of the decree passed or order made under section 579 of the Civil Procedure Code, or he may appeal against the judgment and seek to persuade the Appeal Court to allow him to call additional evidence pursuant to section 558 of the Civil Procedure Code. In either case he will have to satisfy the Court that the additional evidence he desires to adduce was not within his knowledge, or could not be produced by him at the trial, in spite of the exercise of due diligence on his part. When once the hearing of a case is complete, the Courts are very unwilling to allow the same to be re-opened for the purpose of hearing new evidence except for good and substantial cause. *Order accordingly.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.A.

May 26, 1939.

In the Matter of the Estate of Yong Nee Chai, deceased.

YONG JOO LIN AND OTHERS

vs.

LAM TAIP NYONG AND OTHERS

(SELANGOR ORIGINATING SUMMONS No. 134 of 1938)

Courts Enactment, (Cap. 2) S. 49 (i) (a).—Jurisdiction to make representation Orders.

Although the F.M.S. Civil Procedure Code makes no provision for a representation order, the Supreme Court has by virtue of Section 49 (i) (a) of the Courts Enactment, the same jurisdiction to make such an order as is now exercised in England by the Chancery Division of the Court of Justice.

The Judgment below is reported only in so far as it deals with the question of the jurisdiction of the Supreme Court of the Federated Malay States to make representation Orders.

ORIGINATING SUMMONS.

E. D. Shearn for the Plaintiffs.

A. J. Bostock-Hill for defendants Nos. 1, 3 and 4.

R. Madge for Defendant No. 5.

Terrell, J.A.—This was a Summons praying for constructions of the Will of the abovenamed deceased, and certain other relief. The parties before the Court were the Plaintiffs, who are three of the sons of the testator, and the executors under his Will,—and five defendants, all beneficiaries. The four original defendants were Lam Taip Nyong, the principal wife, Yong Kin Lin, another son of the testator, Lim Keow a secondary wife, and Yong Soong Moi a daughter. Subsequently by Order of Court dated the 12th December, 1938, Yong Pang Seok, an infant adopted grandson of the testator mentioned in clause 15 (d) of the Will, was added as a defendant. He appeared by the Registrar as his guardian *ad litem*. The second defendant did not appear. The Plaintiffs were represented by Messrs. Shearn and Charlesworth, the 1st, 3rd and 4th defendants by Mr. Bostock Hill and the 5th defendant by Mr. Madge.

Although a member of each class of persons interested as beneficiaries was before the Court, it appeared desirable that the other members of each class should also be bound by any order made, and accordingly the Plaintiffs applied by summons for the following representation orders, namely that

(1) the plaintiffs be appointed to represent the sons of the deceased

(2) the defendant fourthly above named be appointed to represent the daughters of the deceased

(3) the defendant thirdly above named be appointed to represent the secondary wives of the deceased

(4) the defendant fifthly above named be appointed to represent the deceased's adopted sons and his grandsons adopted or to be adopted to his deceased son Yong Ken Lin.

Unfortunately the Civil Procedure Code makes no provision for a representation order. I took the view, however, that the power to make an order of Court binding upon parties not actually before it, but represented at the hearing by parties in the same interest, is a matter of jurisdiction rather than of procedure, and that as under section 49 (i) (a) of the Courts Enactment the original civil jurisdiction of the Supreme Court shall consist of the same jurisdiction and authority within the F.M.S. as is now exercised in England by the Chancery and King's Bench Divisions of the High Court of Justice, this conferred upon the Court the power to make representation orders which is certainly vested in the Chancery Division of the High Court in England. Accordingly I made the order as prayed.

(His Lordship then proceeded to deal with other questions raised by the Originating Summons).

Order as prayed.

[ORIGINAL CIVIL JURISDICTION]

ROGER HALL, C.J.

March 22, 1938.

IN THE MATTER OF SECTION 46 OF THE ADVOCATES AND SOLICITORS ENACTMENT No. 22/1914 and IN THE MATTER OF A BILL OF COSTS DELIVERED BY MR. S. M. SHARMA AN ADVOCATE AND SOLICITOR.

(SELANGOR CIVIL APPLICATION No. 1 of 1938)

Advocates and Solicitors Enactment (Cap. 15) section 47—Costs of obtaining an Order for taxation of Costs.

The costs fixed under section 47 of the Advocates and Solicitors Enactment (Cap. 15) are intended to cover only ex parte applications and not to applications which are opposed and heard by a Judge.

CIVIL APPLICATION.

Roger Hall, C. J. The Registrar has sought a direction of the Court on the true interpretation of section 47 of the Advocates & Solicitors Enactment (Cap. 15). The relevant part of that section reads:—

> "The costs of obtaining an order for taxation of costs, including petition of course, order and service of order but not including any Court fees payable thereon.....shall be the sum of five dollars".

In the matter under review, the petition was opposed, but an order was made by, Cussen J., that the bill of costs be taxed, and also the costs of the enquiry.